4 Mar '03

STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Richard A. Bandstra C.J., William C. Whitbeck and Donald S. Owens, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant.

v

RICHARD J. MENDOZA

Defendant-Appellee.
_____/

Supreme Court No. 120630

Court of Appeals No. 220272

Circuit Court No. 97-010292

BRIEF AMICUS CURIAE

CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

By: **PETER JON VAN HOEK (P26615)**
3300 Penobscot Building
645 Griswold
Detroit, MI 48226
(313) 256-9833

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES, COURT RULES

STATEMENT OF JURISDICTION

Jurisdiction in this matter is based on this Court's grant of leave to appeal to Plaintiff-Appellant on October 22, 2002, from the decision of the Michigan Court of Appeals on October 9, 2001. MCR 7.301(A)(2).

STATEMENT OF QUESTIONS PRESENTED

I. **IS A DEFENDANT ENTITLED TO A JURY INSTRUCTION ON THE LESSER OFFENSES OF VOLUNTARY AND/OR INVOLUNTARY MANSLAUGHER WHEN CHARGED WITH MURDER, AS THOSE LESSER OFFENSES ARE DEGREES OF THE LAW OF CRIMINAL HOMICIDE THAT ARE INFERIOR TO THE CHARGED OFFENSE UNDER MCL 768.32(1), WHERE THE TRIAL EVIDENCE WOULD PERMIT A RATIONAL JURY TO FIND THAT ONLY THE LESSER AND NOT THE CHARGED OFFENSE WAS COMMITTED?**

Court of Appeals answers, "Yes".
Amicus Curiae answers, "Yes".

Statement of Facts

The defendant in the case on leave granted was convicted in the trial court of second-degree murder [MCL 750.317] and felony-firearm [MCL 750.227b]. The trial court refused a defense request at trial to instruct the jury on the lesser offense of involuntary manslaughter. MCL 750.321.

On direct appeal the Michigan Court of Appeals reversed the convictions and remanded the matter for a new trial, holding the trial judge erred in refusing to instruct the jury on involuntary manslaughter. People v Mendoza, Docket No. 220272, rel'd 10-09-01.

The prosecution applied for leave to appeal from this decision. On October 22, 2002, this Court granted leave to appeal, and specifically ordered the parties to brief the issue of whether, under MCL 768.32(1) and the recent opinion in People v Cornell, 466 Mich 335 (2002), under what circumstances, if any, is a person charged with murder entitled to an instruction on the lesser offense of manslaughter. People v Mendoza, 467 Mich 887 (2002). The order granting leave to appeal expressly invited interested persons or groups to move for permission to submit briefs amicus curiae on this issue.

I. A DEFENDANT IS ENTITLED TO A JURY INSTRUCTION ON THE LESSER OFFENSES OF VOLUNTARY AND/OR INVOLUNTARY MANSLAUGHER WHEN CHARGED WITH MURDER, AS THOSE LESSER OFFENSES ARE DEGREES OF THE LAW OF CRIMINAL HOMICIDE THAT ARE INFERIOR TO THE CHARGED OFFENSE UNDER MCL 768.32(1), WHERE THE TRIAL EVIDENCE WOULD PERMIT A RATIONAL JURY TO FIND THAT ONLY THE LESSER AND NOT THE CHARGED OFFENSE WAS COMMITTED.

Standard of Review:

The applicable standard of review for this issue is de novo, as it involves the construction of a statute. See People v Bobek, 217 Mich App 524 (1996).

Argument:

The resolution of the legal issue in the present case must start with consideration of this Court's recent ruling in People v Cornell, 466 Mich 335 (2002), and its companion cases. People v Silver, 466 Mich 386 (2002); People v Reese, 466 Mich 440 (2002). The Court in Cornell held its ruling is to be applied retroactively to "those cases pending on appeal in which the issue has been raised and preserved," so the opinion would be controlling on the parties to this case on leave granted. 466 Mich at 367.

In Cornell, this Court reviewed the state of Michigan law on the right of a party to request jury instructions on lesser included offenses. The majority opinion started that review by reference to the controlling statute, MCL 768.32(1), which reads:

> Except as provided in subsection (2), upon an indictment for an offense, **consisting of different degrees**, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of **a degree of**

> **that offense inferior to that charged in the indictment**, or of an attempt to commit that offense. (Emphasis added).

Finding that the current statute is virtually unchanged from the original version enacted in 1846, the Court focused on the interpretation of that statute in Hanna v The People, 19 Mich 316 (1869). The Cornell majority quoted at length from the opinion of Justice Christiancy in Hanna. In that decision, which held the accused was entitled to an instruction on assault and battery where charged with assault with intent to kill, Justice Christiancy concluded the statute does not limit the right to instructions on lesser offenses to only those situations where the Legislature expressly divides or designates an offense into "degrees." 19 Mich at 321. He wrote:

> Thus confined, it would apply, so far as I have been able to discover, only to the single case of an indictment for murder in the first degree, **and would not even include manslaughter as a lower degree of the offense**, but only murder in the second degree; since murder is the only offense divided by the statute into classes expressly designated as "degrees." Beside, if thus restricted to the crime of murder, it can apply only to that very class of cases in which it was not needed, either as declaratory of, or as amending the common law; **since, without the provision, the common law by the narrowest application ever adopted, had already fully provided for the case; as no one can doubt that without this provision, the common law rule would, under the statute, dividing murder into degrees, have authorized a conviction not only for murder in the second degree, but for manslaughter also, under an indictment for murder in the first degree, all these offenses being felonies included in the charge**. 19 Mich at 321-322. (Emphasis added).

Justice Christiancy went on in Hanna to conclude the statute applies in all cases where the Legislature "has substantially, or in effect, recognized and provided for the punishment of offenses of different grades, or degrees of enormity, where the charge for the higher grade includes a charge for the less." 19 Mich at 322.

The Cornell Court noted that the Hanna ruling did not exempt offenses designated as misdemeanors rather than felonies from being inferior degrees of a charged offense. In Hanna,

the Court noted the indictment on the higher charge was notice to the accused of the lesser as well, being an inferior degree of the charged offense.

The Cornell Court went on to review the subsequent Michigan law on the right to instructions on lesser included offenses, primarily the decisions in People v Chamblis, 395 Mich 408 (1975); People v Jones, 395 Mich 379 (1975); and People v Stephens, 416 Mich 252(1982), which first created and then overruled a bar on instructions on misdemeanor lesser offenses when charged with a felony, and created different rules for instructions depending on whether the lesser offense was characterized a "necessarily included" offense or a "cognate" offense. These cases and their progeny established rules that a party was always entitled to an instruction on a "necessarily included" offense, where all of the elements of the lesser offense were included in the greater offense, and that a party could get an instruction on a "cognate included" or related offense, where the lesser offense has some of the elements of the charged offense but also additional elements, if the trial evidence would have reasonably supported a jury finding that only the cognate offense and not the greater offense had been convicted.

After review of this history, the Cornell Court concluded these cases ignored the language of the statute, as properly interpreted in Hanna, and ultimately overruled this line of authority in favor of the statutory interpretation authored by Justice Christiancy:

> "Therefore, in our opinion, it is necessary to return to the statute and the construction it was given by the Hanna Court and by Justice Coleman in her dissent in Jones.
>
> In pertinent part, the statute provides that the jury "may find the accused person guilty of a degree of that offense inferior to that charged in the indictment." MCL 768.32(1). As the Hanna Court explained, the provision was not intended to be limited only to those expressly divided into "degrees," but was intended to extend to all cases in which different grades of offenses or degrees of enormity had been recognized. Moreover the statute removed the common-law misdemeanor restriction. Thus, application of the statute is

> neither limited to those crimes expressly divided into degrees nor to lesser included felonies. 466 Mich at 353-354.

In Jones, Justice Coleman in dissent had argued that a party should only be entitled to an instruction on a "necessarily included" offense. The Cornell Court agreed with that position, again citing the statute which permits a jury only to convict of an offense "inferior" to that charged in the indictment. Citing with favor to the opinion in People v Torres (On Remand), 222 Mich App 411, 419-420 (1997), the Court held the term "inferior," as used in the statute, "does not refer to inferiority in the penalty associated with the offense, but, rather, to the absence of an element that distinguishes the charged offense from the lesser offense. The controlling factor is whether the lesser offense can be proved by the same facts that are used to establish the charged offense." 466 Mich at 354.

The Court in Cornell went on to find that even as to offenses meeting the test of being an inferior offense that is a degree of the charged crime, a party is only entitled to an instruction if the trial record shows the party disputed a factor that is required for conviction on the greater offense but not for the lesser, and a rational view of the evidence would support a verdict that only the lesser offense occurred. Comparing the Michigan statute to the Federal provision in FRCP 31(c), as construed by the United States Supreme Court in Sansone v United States , 380 US 343; 85 S Ct 1004; 13 L Ed 2d 882 (1965), the Cornell majority held an instruction on a lesser offense is only proper "if the charged offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." 466 Mich at 357.[1]

[1] In the companion cases the Court applied the Cornell ruling to two different situations. In Silver, supra, a majority of the Court found the offense of

Amicus acknowledges the body of prior Michigan law that characterizes both voluntary and involuntary manslaughter as "cognate included" offenses under a murder charge. See, for example, People v Van Wyck, 402 Mich 266 (1978); People v Pouncey, 437 Mich 382 (1991); People v Heflin, 434 Mich 482 (1990); People v Maghzal, 170 Mich App 340 (1988). If the Cornell Court's stated approval of Justice Coleman's dissent in Jones, where she concluded a party only has the right to an instruction on a necessarily included offense, is read literally, then the Appellee's claims in the instant case would face an insurmountable hurdle.

However, Amicus asserts that Cornell cannot be read to preclude instructions on every lesser offense that had previously been characterized as a "cognate" offense. Those characterizations occurred under the prior case law which the Cornell majority has now overruled. Instead, the Cornell opinion should instead be read as having returned Michigan law to the interpretation of MCL 768.32(1) as set forth in Hanna, supra. At the time of the Hanna decision, the case law did not distinguish between lesser offenses using the terms "necessarily included" or "cognate included," and, more importantly, the statute itself, either in its original language or its present form, does not use that terminology.[2] The Hanna Court construed the statute's use of the term "degree," and concluded that it encompasses not only situations where the Legislature expressly used "degree" in the title of an offense, such as first degree murder, but also more generally where there is a statutory scheme involving a certain category of offenses. Where history clearly shows the Legislature created a series of offenses of diminishing degrees

---

breaking and entering without permission to be an included offense of an inferior degree to the charged offense of home invasion, and that the accused was entitled to an instruction on the lesser offense as he had factually disputed at trial whether he had broken and entered the house with any intent to commit a felony inside. On the other hand, in Reese, supra, the Court ruled the offense of unarmed robbery is an included offense of an inferior degree to a charge of armed robbery, but held the accused was not entitled to any instruction on unarmed robbery as the defense at trial had not factually disputed the prosecution's evidence that the robber was armed with a weapon.

[2] Compare FRCP 31(c), which does use "necessarily included" language. See 466 Mich at 356.

of enormity underneath the most severe offense, the accused may be entitled, given the particular record in the case, to an instruction and verdict on any of those degrees of crime. Accordingly, the Hanna rule, which has now been endorsed by the Court in Cornell, did not and does not use the "necessarily included – cognate included" test for when a lesser included offense instruction is appropriate. Instead, the test looks only to whether the lesser offense is one of an inferior degree to the charged offense.

Defendant submits the Cornell Court's approval of Justice Coleman's dissent in Jones can be reconciled with their concurrent approval of the Hanna decision's interpretation of the statute. Viewed under the statutory language, as construed by Justice Christiancy, it is clear that virtually all offenses previously characterized as "necessarily included" would meet the test of being a "degree" of the charged offense under the general statutory scheme. For example, unarmed robbery clearly would be a degree of a general statutory scheme concerning larcenies from the person of the property owner, one which is "inferior" to the most severe example – armed robbery – but still part of every claim of an armed robbery charge. Similarly, second degree murder is clearly a "degree" of criminal homicide, inferior, under the Hanna test, to a charge of first degree murder.[3]

On the other hand, the fact that a particular offense had been categorized in the prior case law as a "cognate included" offense does not of necessity mean that it could not qualify as being of an inferior degree to the charged offense under the Hanna test. While most "cognate" offenses may not be sufficiently within a discrete statutory scheme to be considered part of the hierarchy of degrees of a charged offense, not every such offense should be automatically

excluded from the list of possible lesser degree offenses just because they were classified as "cognate" offenses during a time period where the "degree" test was, according to the Cornell Court, being improperly ignored. To impose a blanket rule that any offense previously termed a "cognate" offense can **never** be instructed upon to a jury, regardless of the nature of that offense in the overall statutory scheme, would in essence again ignore the statutory construction engaged in by Justice Christiancy in Hanna, a construction the Court in Cornell has found the correct interpretation of this long-standing legislation. It would have been unnecessary for the Cornell Court to even discuss the Hanna ruling had they intended to merely institute an absolute rule that no offense previously termed a "cognate" offense can ever again be instructed upon as a lesser included offense. All that would have been required to announce such a rule would have been for the Court to state it using only the "necessarily included – cognate included" distinction.

This Court should find, under the particulars of the case at bar, that the offenses of voluntary and involuntary manslaughter, even though previously termed "cognate" included offenses to a murder charge, can still be instructed upon, where otherwise appropriate, under the Cornell decision. There are several justifications for such a ruling.

First, and most obviously, the Hanna decision itself mandates such a result. In Hanna, Justice Christiancy interpreted the statutory term "degree" to constitute a broader range of offenses than merely those where there is an express use of that term in the Legislature's title. He did so precisely to **avoid** the result that a defendant could never get a manslaughter instruction when charged with murder. He concluded that while the Legislature did not title the manslaughter statute as a further "degree" of murder (such as "third" or "fourth degree"), they

---

[3] The Cornell Court, while noting they had overruled the Jenkins rule mandating a second degree murder instruction in every first degree murder trial, regardless of the evidence, acknowledged that in most such trials the defense would sufficiently dispute the intent and/or premeditation

did not intend to alter the well-recognized common-law rule that manslaughter is a "degree" of the law of criminal homicide. To the contrary, Justice Christiancy noted that not even the "narrowest application" of the common law would have precluded a murder defendant from being able, where factual appropriate, to have the jury consider if he or she was only guilty of manslaughter. 19 Mich at 320. He expressly wrote that manslaughter, as well as second degree murder, are "felonies included in the charge" of first degree murder. 19 Mich at 320. It would be odd indeed for the Cornell Court to have adopted Justice Christiancy's statutory interpretation as the correct one, regardless of the years of intervening case law, and then reject that interpretation as it impacts on the **exact** statutory scheme he used to illustrate why he was construing the statutory term "degree" broader than a literal reading of the titles of crimes. Under Hanna, manslaughter manifestly meets the test of being an offense of an inferior degree to a charge of first degree murder, and thus one on which that the accused is entitled to an instruction if the further tests of the record are supportive. At common law, as Justice Christiancy wrote, "no one could doubt" that manslaughter is a lower degree of enormity within the law of criminal homicide. If, as the Cornell Court held, the statute codified that common law principle, it permits a defendant to request instructions on manslaughter in a murder case where the record supports that request.

Second, ruling that the statute allows for instructions on manslaughter in murder cases would made Michigan law consistent with Federal law under FRCP 31(c). In Schmuck v United States, 489 US 705; 109 S Ct 1443; 103 L Ed 2d 734 (1989), the United States Supreme Court, in ruling that the proper test for when a lesser offense is "necessarily included in the offense charged" under 31(c) is an elements test rather than a broader "inherent relationship" test, noted

---

elements to require the court to give a second degree murder instruction. 466 Mich at 358, fn. 13.

that as far back as the opinion in Stevenson v United States, 162 US 313; 16 S Ct 839; 40 L Ed 980 (1896), the Court found manslaughter is an included offense under a murder charge using an elements analysis. 489 US at 720. See also DeMarrias v United States, 487 F2d 19, 21 (CA 8, 1973).

Finally, it would be fundamentally unfair for Michigan courts to rule that under no conceivable circumstances could a defendant charged with either first or second degree murder ever be entitled to an instruction on either voluntary or involuntary manslaughter. Where the accused admits causing the fatality, but disputes the intent element or asserts that while the killing was intentional it was mitigated by sufficient provocation to reduce the offense to voluntary manslaughter, it should be held that a state rule which bars the defense from getting a jury instruction on manslaughter, even though a rational jury could find that only the lesser offense was committed, violates due process of law in that it effectively prevents the accused from submitting his defense theory to the jury and getting a verdict consistent with the defense admission of a lesser degree of culpability. US Const, Amend V, XIV; Hopper v Evans, 456 US 605; 102 S Ct 2049; 72 L Ed 2d 367 (1982); Beck v Alabama, 447 US 625; 100 S Ct 2382; 65 L Ed 2d 392 (1980); Bennett v Scroggy, 793 F2d 772 (CA 6, 1986); Ferrazza v Mintzes, 735 F2d 967 (CA 6, 1984). As will be argued in the final section of this issue, it has been recognized that a jury is unlikely to acquit a defendant who admits a lesser degree of criminal behavior where no option is given to the jury to convict consistent with the defense admission. See People v Silver, supra at 393, fn. 7.

For these reasons, this Court should hold that under MCL 768.32(1) and People v Cornell, supra, a defendant is entitled to instructions on voluntary and/or involuntary

manslaughter when charged with a degree of murder, assuming the other requirements of the Cornell test are met given the evidentiary record in the case.

While the prosecution may assert that if the jury believes the prosecution has not proven all of the elements of the murder charge beyond a reasonable doubt, they would acquit the accused of all charges, despite a defense admission of commission of manslaughter, this Court has recognized that under these unique circumstances such a verdict is highly unlikely. In Silver, supra at 393, fn.7, the Court, citing to the opinion of the United States Supreme Court in Keeble v United States , 412 US 205, 212-213; 93 S Ct 1993; 36 L Ed 2d 844 (1973), characterized this argument as "too facile," stating that "where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." Where the accused never denies causing the death, and never claims to the jury that he or she acted in legitimate self-defense, it is highly unlikely a jury will be willing to totally acquit him. As the Court in Silver recognized, a failure to give the jury the option to find the accused guilty of the offense the accused admits having committed, under these circumstances, is prejudicial error even under the Cornell standards.

This Court should hold that the offenses of voluntary and involuntary manslaughter are "degrees of that offense [murder] inferior to that charged in the indictment," and thus that a party is entitled to an instruction on either or both of those lesser offenses when charged with murder if the evidence would support a jury verdict that only the lesser and not the charged offense was committed. MCL 768.32(1); People v Cornell, supra; Hanna v People, supra. As each of the parties to this action agree this should be the proper resolution of the legal question, the Court

should apply that ruling to the specific facts of the case at issue, and decide if this record supported the defense request for an instruction on involuntary manslaughter.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Amicus asks that this Honorable Court hold that the offenses of involuntary and voluntary manslaughter are degrees of murder under MCL 768.32(1).

Respectfully submitted,

CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

BY: Peter Jon Van Hoek

PETER JON VAN HOEK (P26615)
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Dated: February 3, 2003.